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THE RIGHT OF A FOREIGN CORPORATION APPLYING FOR ADMISSION TO ATTACK CONSTITUTIONALITY, IN PART, OF STATUTE IMPOSING CONDITIONS OF ADMISSION.

The Supreme Court of Missouri lately considered the question of the right of a foreign corporation seeking a license to do business in the state to attack the constitutionality of its statute, so far as one only of its requirements were concerned. State ex rel. Atlantic Horse Ins. Co. v. Blake, 144 S. W. 1094.

The court, going upon the theory as held in Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 6 Am. Cas. 317, one of the successors in this line of Paul v. Virginia, 8 Wall. 168, that a state may exclude a foreign corporation for any reason good or bad, or for no reason at all, held that a foreign corporation had no standing in court to assail as unconstitutional any provision of a general statute prescribing the conditions upon which it might be permitted to do business in a state.

This ruling is confined, however, to a foreign corporation seeking admission and does not extend to such a corporation seeking a renewal certificate after it has been admitted.

The *locus standi* of a foreign corporation in the latter situation was defined in State ex rel. v. Vandiver, *222* Mo. 206, 121 S. W. 45, as follows: "It was so domiciled in the state as to give it the right to challenge unconstitutional laws. It acquired that right by virtue of the original certificate, and the renewed certificate is but to the effect that it was still in good standing under the original certificate, which original gave to it admission to the state."

We do not see anything here but assertion, and, to our mind, it is extremely difficult to distinguish between a corporation proposing to enter a state and one that has lived out its permitted term asking a renewal of a permit in their right to challenge state law as unconstitutional. When it is declared that its being "domiciled" gave the foreign corporation the right of challenge, reply might be made that the domicil was both qualified and limited, and was accepted as conferred.

While, however, we can perceive no distinction in the way we have thus spoken of, we think the court's ruling in permitting a challenge in the Vandiver case was correct, and that it has erred in the Blake case in refusing to consider such a challenge. In both cases there existed, as we see the matter, a right of challenge and for one and the same reason, as we shall endeavor to demonstrate.

It is not to be disputed that a state may bar foreign corporations, except as its power is qualified by the superior rights of interstate commerce, from doing business therein. As a corrollary to this power it may attach whatsoever conditions it pleases to their doing such business.

The question, however, is, whether, if a state impliedly invites a foreign corporation to apply to it for permission to enter its borders, or to ask a permit to remain longer therein, and it accepts the invitation to apply for the one permit or the other, it has a right to demand from a state's officer the issuance of a permit, when in accepting the invitation it does all that state law requires.

It is certainly true, that the foreign corporation has a right to compel, through the courts of the state, the state's proper officer to give the formal evidence of a permit, if through mistaken view of what the law requires, that officer refuses to comply with his duty.

This being true, it must be conceded that a foreign corporation, properly applying for a permit, acquires a *right* under state law to have state courts pass on its application.

The court says: "Laws enacted by the legislature are presumed to be valid, and even if defective because violative of some provision of the state constitution are not void, although they may in a proper case be avoidable; that is upon complaint by a

party whose *rights* are impaired by such statute." * * * We hold, however, that as relator has no right to admission into the state which the statute violates it is not in position to challenge the validity of the statute."

But we reply relator acquires a *right* to admission by complying with state law therefor and the state does not qualify the grant of that right by excepting therefrom interference by unconstitutional statute.

On the contrary, the state, having the free and unlimited power to impose conditions upon the plea of the corporation to come or to stay, freely and broadly proclaims what it will do and backs up its proclamation by giving a remedy to the corporation which acts upon the faith thereof.

It may have an appearance of brashness that a foreign corporation should try to get into a state by assailing the constitutionality of its laws. But, on the other hand, the state is telling it, that it will be glad to have it come, if it complies with laws duly enacted, and that none of its officers may keep it out.

These officers are but the ministerial agents of its policy, and it is something like a sinister invitation to allow them to interfere, when the state is conferring, not merely a privilege, but also a valuable right.

As we have said, the aid of a state court may be invoked against a state officer merely misconstruing a statute against a corporation applying for admission. Therefore an applying corporation may invoke—or has the right to invoke—jurisdiction against wrongful exclusion.

But, if there is a right to invoke jurisdiction at all, then there is a right for the adjudication of the asserted right to enter the state. There can be no earthly doubt about the state intending to grant and the corporation to accept this right. And there also is no doubt, that an unconstitutional law does not impair a right otherwise belonging to a person, natural or artificial. Therefore, why should not a foreign corporation complying with every constitutional law for its admission assert its right to admission and ask for adjudication of its claim of right?

The Missouri court seems to us to predicate its ruling upon the lack of general right of a corporation to enter the state. We admit it has no general right, but it may have a special right when it puts itself in an attitude a state invites.

It may not be an absolute legal right. It ought to be as good as that. It is the promise of a sovereign whose courts should be jealous to see that the promise is performed. When they allow an officer to override the promise, because of an unconstitutional statute, they may excuse him because of the statute's presumptive validity. When, however, the courts do the same thing they place the statute above the constitution, and when technicality makes a state violate its faith, it outstrips its usefulness.

Judge Woodson dissented from the ruling in a brief opinion, in which he claims the relator had the right to have the court declare whether it had complied with the law so as to entitle it to a license—the view we have endeavored to elaborate.

NOTES OF IMPORTANT DECISIONS

JUDGMENT—ABBREVIATIONS OF WORDS IN ENTRY.—The Supreme Court of Illinois, by a majority of four to one, decides the case of Stein v. Meyers, 97 N. E. 295, the majority battling with the dissentient in ten pages of fine print, when the difference could have been expressed in ten lines.

This majority held that a judgment in an action of forcible detainer as follows: "Fndg deft G with prem descr in complt., judg on fndg, etc.," was "simply a jumble of words and letters and conveys no meaning whatever to an English-speaking person," while the dissent says: "It can hardly be said that judges, attorneys and officers of courts and those familiar with judicial proceedings would not easily understand these abbreviations from the context." We feel so sure that the dissent is correct about this, that we simply refer to the fact of the form of action without giving the

words for which the abbreviations were intended to stand.

There seems no difference whatever between these judges as to the lawfulness of abbreviations, and the dissent gives a great number of those in use every day, but how four out of five judges could say the abbreviations considered were unintelligible it is hard to understand. It was conceded by the majority opinion that the Illinois statute authorizes judgment in the municipal court in abbreviated forms, and that this form was sufficient were it intelligible. But that it was intelligible seems very evident.

NOTES OF RECENT DECISIONS IN THE BRITISH COURTS.

The question whether or not a company carries on business in this country has been frequently considered in questions of income tax and jurisdiction. The action, Norwegian Shipping Company Hercules v. The Grand Trunk Pacific Railway Company, 56 S. J. 61, was a jurisdiction question and affects company law in that it narrows very considerably the question when a foreign company may be said to be carrying on business here. The cause of action was a claim for demurrage and service of the writ was made on the defendants in London. The plaintiffs contended that they were not carrying on their business in London, namely the business of running their railway, all they were doing in this country was raising money by the issue of debentures. The Court of Appeal unanimously held that the distinction sought to be drawn was an impossible one, that business was carried on in London by the defendants and that the company was "there" for the purposes of the service of the writ.

A bequest was made of "twenty-three of the shares belonging to me" in a certain company. At the date of the will the testator held a number of £80 shares in this company. Subsequently these shares were divided into two £40 shares. On the death of the testator it was held (in re Clifford, L. R., 1912, 1 Ch. 29), that the description could not be read as speaking from the testator's death, and so including all things then answering to it and nothing else, but referred to specific things existing at the date of the will. It did not fail, therefore, since the specific things still existed, though a change in their form and name had taken place, and consequently the legatee was entitled to forty-six £40 shares which represented the twenty-three £80 shares bequeathed.

A not uncommon case in the law of principal and agent is an action by a creditor against the agent seeking to have him made personally liable, generally for the reason that the principal is not worth suing, and on the plea that credit was given to the agent only. Armour v. T. L. Duff & Co., 1911, 2 S. L. T. 397, was an action by a ship store merchant against ship brokers on the averment that they had held themselves out as principals. Sheriff Gardner Millar's judgment was affirmed with express approval by the Court of Session and his statement of the broad principle involved is worth noting: "The defenders are ship brokers and are said to be in a large way of business, although they are also said to be steamship owners. The order is in these terms, 'Please supply the S. S. Silvia with the following stores.' If a firm of brokers gives an order in these terms it seems to me that they are acting on behalf of the owners of the ship and as these can be discovered from the shipping registry, the principals of the broker are disclosed. Unless, therefore, the defenders put themselves forward as being the owners, I do not think they are liable as principals. There is no evidence of their having done so in the present case."

Foote v. Shaw Stewart & ors., 1911, 2 S. L. T. 364, was an action against the directors of an infirmary for damages in respect of failure to treat the plaintiff with proper skill and care while a patient in that infirmary. The action was held irrelevant on the ground that medical men on the staff of such an establishment were not servants of the governing body, the legal responsibility of the latter being confined to a careful selection by them of a professional staff, and did not extend to the supervision by them of the professional actings of members of the staff or to any sort of guarantee that these would be performed with skill and care in any given case.

A testatrix had certain Victorian securities. By one codicil she gave a number of legacies "to be paid out of my Victorian bonds." A later codicil recited that she had a sum of Victorian stock which she had not put into her will and proceeded to make certain bequests thereof. The court, being satisfied that the Victorian stock mentioned in the second codicil was the same as the Victorian bonds in the first, the question arose whether the latter legacies effected a revocation of the former? The Master of the Rolls referred to the rule suggested in Theobald on Wills: "The true view may be that a revocation grounded

on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is conditional on the fact being true." His Lordship adopted that as an accurate statement of the law and found as a matter of construction that in the present case the truth of the fact in the recital or preamble to the second Codicil was the condition of the subsequent disposition. He therefore held that the ordinary doctrine of revocation by an inconsistent subsequent disposition did not apply, and that the gifts in the earlier codicil took effect.

DONALD MacKAY.

Glasgow.

THE "TENEMENT HOUSE" DECISION BY THE NEW YORK COURT OF APPEALS AROUSES ANOTHER "APPEAL TO THE PEOPLE" PROTEST.

If New York were some wild frontier settlement, it would even then be hard to account for its continual prominence as a veritable hot-bed of agitation against the judiciary.

Mr. Roosevelt not so long ago condemns the New York Court of Appeal for its Compensation Act decision. Justice Gaynor only recently condemns the same court for another decision and now comes Mr. Edward T. Devine, of New York City and circulates broadcast over the country a circular letter holding up the same court to the ridicule of the nation for its recent ruling in the case of Grimmer v. The Tenement House Department of New York, in which that court held the tenement house law inapplicable to apartment houses.

Truly, the life of a justice on the bench of the New York Court of Appeals is a miserable one. He never can expect to escape censure, no matter how he decides a case, since there will always be one or other of the parties ready to metaphorically "appeal the cause to the people." How the people of New York can have any respect for their highest court in view of the recent attacks made upon it, we confess our inability to understand.

And much of this criticism is manifestly unfair. Take, for instance, the latest outburst against the "tenement house" decision above referred to. In this case it appeared that in 1901, the legislature enacted the Tenement House Act, designed to remedy evil conditions in congested districts of New York and Brooklyn. The law provided stringent regulation for visitorial powers to be exercised by a commission with power to remedy unsanitary conditions and to enforce certain building restrictions. This act did not distinguish between a tenement house and an apartment house, but the New York Building Code of 1897, approved by a special act of the New York Legislature in 1901, did make a distinction by providing that in an apartment house there should be a separate kitchen, a water closet and a set bath tub. Where each apartment in a building used by three or more families was thus provided the building would then be known as an apartment house and should be under the supervision of the Building Department of New York City.

The opinion of the Court of Appeals handed down on February 13, 1912, and concurred in by all the judges takes pains to show that the court cannot remedy legislative clumsiness. When the legislature leaves a prior special act on the books unrepealed, clearly segregating apartment houses from tenement houses and afterwards passes an act dealing only with the subject of tenement houses, by what rule of construction can any court wipe out a clear distinction thus created by the legislature and unrepealed by them even though it be convinced that such was the intention of the legislature.

Now comes the "appeal to the people" which we suppose is intended as a prelude to the "recall of judicial decisions" when that new departure, advocated by a distinguished New York citizen comes into vogue. Mr. Edward T. Devine, in his circular letter, says in part:

We are really distressed to find that the highest court of the first state in the union has again gone wrong—this time in reversing by judicial legislation the legal definition of a tenement house which has been in force continuously in New York city for forty-five years.

When the tenement house law was enacted in 1901, it expressly repealed all statutes of the state and ordinances of the city inconsistent with its provisions. The report of the tenement house commission on which this act was based painstakingly discussed the reasons for not making a distinction between tenement houses and apartment houses and the legislature was fully aware what it was doing. In the eleven years since this act was passed not a house has been built, not a plan has been filed, for an "apartment house." Every year hundreds of tenement houses have been built in which there are set bath-tubs and virtually every tenement house built in the decade has had its kitchen and its separate water closet.

A few days after the tenement house law was enacted in 1901, the legislature, in revising the municipal charter re-enacted and continued in force the "existing" building code. If this building code at that time exempted from the operation of the tenement house law any building which would otherwise have come under it, such exemption could not have been valid unless we are to assume that a local municipal assembly has the right to amend or repeal a state law. No one claimed that it did make any such exemption. For thirty-four years, at the time when these two laws were passed in 1901, tenement houses had been built and inspected under state law. After full and vigorous discussion, after an official investigation by a state commission, the existing definition was re-enacted, new and more stringent provisions were introduced into the law, and by a section of the new city charter a separate department was created in New York City to enforce these old and new provisions. What shall be said of a decision, which, at this late day, takes the extraordinary position that the definition in a local ordinance, which never has had any vitality or significance, which was expressly repealed in case it had any such meaning as is now assigned to it, supersedes and destroys the obvious and clearly expressed intention of the legislature? That intention certainly was to control through the tenement house act and the tenement house chapter of the charter the erection and sanitary condition of all congregate dwellings in which three or more families live independently.

There are no safeguards required by the law in the construction of tenements which are not entirely reasonable and appropriate for middle-grade and high-grade apartments as well as for tenements without bath tubs. If the presence of a bath tub and especially of a "tiled" bath-room like those in the apartment house in question suggest that frequent sanitary inspection is less necessary than in a tenement without bath tubs, the tenement house department may discriminate and it does so habitually. There has been no complaint from dwellers in high-class apartment houses that they are molested by unnecessary tenement house supervision. Even they are entitled to fire-escapes and such protection as the tenement house law gives. Any such distinction as the Court of Appeals seeks to establish is undemocratic, arbitrary, and useless. All that one can say as to the merits of the decision is that it puts a severe strain upon the strongest desire to retain respect for the courts.

Admitting that there is strength to Mr. Devine's argument (and, by the way, there is usually some merit to even a defeated litigant's contention) it is purely ex parte and does not at all assist the court in escaping the dilemma created by the legislature's ill-considered action. Moreover, it would strike any man on first impression that there is a clear distinction between apartment and tenement houses that should be observed in enforcing the strict provisions of a tenement house law. At least this is sufficiently clear to have easily justified the court's decision and thrown the responsibility for the situation created upon the legislature.

Not satisfied, however, with having presented only a fairly ex parte presentation of his case, the writer of this remarkable "appeal" gathers up into one indictment all the past offenses of the New York Court of Appeals (absolutely irrelevant to the presentation of his case) and adding to such grouping of "bad decisions" the cumulative force of this latest "offense," hurls at the defenseless court the following tremendous broadside of invective:

We hold it to be essential, as a condition of retaining popular respect for courts in general, that such decisions as this one destroying the tenement house law, the decision of a year ago destroying the workingmen's compensation act, and that of twelve years ago, which is still in force and effect, destroying the constitutional and statutory power of the State Board of Charities to inspect private charitable institutions, should be held up to the reprobation and scorn which they deserve. They could not have been made by judges who understood the questions involved, assuming, of course, as we are bound to assume, an honest intention to safeguard the public interest and to uphold the law and the constitution.

When a reactionary and misinformed court interprets the constitutional guarantee of due process of law, which no one should desire to see abridged by amendment to the constitution, as inconsistent with any system of compensation for industrial injuries, except on a basis of personal fault and negligence on the part of the employer, we appeal, as the court contemptuously bids us, to the people. We choose, however, our own form of appeal. The fundamental remedy lies not in amendment, though that may be necessary; but in a public understanding and appreciation of the calamity involved in the decision, in a process of education through which it will eventually be brought home to the judges and their successors that such blundering with human lives, and with the just claims of widows and or-

phans, is not good law any more than it is good economics, philosophy, and morals. When the court twists and turns in its reasoning, as it did in the decision of 1900, to which we have referred, until Josephine Shaw Lowell was led to declare that "it is no light matter that the confidence of the public in the intelligence of the majority of the judges of its highest court should be put to such a test," we appeal again to the people, not for a reversal by "spelling out" some amendment to constitution or statute, but to bring to bear upon the bench and the bar that educational process which is our only genuine safeguard against such calamities.

"When, finally, in the tenement house decision we have a deliberate policy of the state, enacted and re-enacted into law by the legislature, approved by successive municipal administrations and by overwhelming public opinion, lightly upset by a thunderbolt from a clear sky, by disinterring a clause from a local ordinance which never had any significance and which had been repealed by the legislature, we take a solemn appeal, of which the new legislative act is but an incident, an appeal in the wide forum of public opinion, an appeal to the people."

With all proper respect for Mr. Devine's argument and recognizing only too clearly some of the defects of our judicial administration of the law, especially in matters of procedure, we cannot say too positively that such attacks upon the judiciary as are offered by lawyers such as Mr. Devine seem to us to be as reactionary as some of the decision against which they so bitterly inveigh; and that as between a reactionary bench and a reactionary bar, we would rather choose the former as the lesser of two evils.

We do not object to popular discussion of judicial decisions. We believe that judges, as men, are more apt to do right where their conduct is open to public scrutiny and fair, public discussion. But such an admission does not involve a recognition of the right of members of the bar in taking "appeals to the people" when they are defeated in particular cases and to hold up the court to the ridicule of the public by statements implying that the court is a monstrosity of the densest ignorance and that no man's rights are safe in their hands. Such a course is wholly unnecessary and totally unethical.

Judges are not in a class by themselves; they are an integral inseparable part of the bar from which they are selected. That they do not rise higher in intelligence than they do is a reflection not on the bench, but on the profession itself of which they are usually a fair representation. Attacks upon the intelligence of the bench is virtually an attack on the profession itself and on that particular member thereof who becomes the author of the attack and who would probably not be any more superior as a judge than the members of the court which he has attacked.

It would hardly seem necessary to direct a lawyer's attention to the fact that many of the cases decided on appeal are really of a very difficult character. There are usually two good sides to every case and, therefore, no matter which way the court decides, and it may itself be still in doubt even after it has rendered its decision, there will always be a fair debatable ground for an "appeal to the people" and an attack upon the judges who have taken part in the decision. But is it not in the interest of the public welfare that all litigation be decided promptly and finally—that even courts shall be compelled to solve their doubts by arbitrarily severing the Gordian knot in order to reach a decision?

If this be true, then acquiescence in the decision of the courts is cardinally necessary to any effective judicial administration of the law. Such innovations, therefore, as "appeals to the people" and "recall of decisions" keeps unsettled all business and personal relations in life, throws the public mind into unnecessary confusion, resulting in anarchy and those wild orgies of an inflamed and misguided popular mind that accompanied the French revolution.

In all games of sport the umpire's decision is upheld jealously and vigorously, not because it is infallible, but because it is the only possible way by which men can determine such matters between themselves. How much more important to business and society that disputes between individual units shall not drag on unsettled forever to disturb and infect the peace and health of the body politic. Anglo-Saxon common sense ridicules the player in the game who blames the umpire for his defeat. Shall not the same attitude, for the good reasons already indicated, be taken toward the lawyer who is often too ready to take his "appeal to the people" and to blame the judge for his defeat or for the inaccuracies of legislation upon which he has too confidently relied.

A. H. R.

WHAT IS BEING DONE BY PUBLIC UTILITY COMMISSIONS.

The Legal Status of Utility Regulation.—In the broad, equitable principles that are, fortunately, being more and more recognized in the application of law to public questions, we may say that this power of the state to regulate public utilities is based on three fundamental conceptions. First, that a public utility is a monopoly; second, that it performs a public service, is favored with especial privileges and must yield a special obedience to the state's control; third, that its franchise values and any increase in value of its securities, come solely from the growth of the city and not from any act or activity on the part of the utility company.

It was, of course, in the early phase of their development, a principle earnestly contended for by the public service companies, that they were simple commercial enterprises, operated for private gain and in no wise to be differentiated from any other business or manufacturing concern. This contention was admitted by the public generally, and was, in fact, sanctioned by judicial authority. Thus we find the Supreme Court of Connecticut declaring in the sixties[1] that a gas company was a manufacturing corporation engaged in a private business and could sell at such price as it pleased and to whom it pleased. The court said that no reason could be seen "for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and venders of other commodities are subjected by the rules of law."

We would probably be justified in saying that the case of Munn v. Illinois,[2] decided in 1876, marked the end of the "Public be damned" policy, and the birth of the new order of things. That case was the enunciation by the Supreme Court of the United States, of the modern application of the common-law principle that any business or trade that constitutes a monopoly is subject to governmental regulation and control in the interest of the public at large. And the court held that an elevator, the services of which are a practical necessity to every shipper from that port, must submit to enactments requiring it to grant fair and reasonable rates to all. After this decision there followed with irresistible logic, legislative enactments particularly directed at common-carriers and resulting in the Interstate Commerce Act. The different states gradually awakened to the situation and enacted rate legislation applicable to all shipments arising and ending within their respective borders. From this it was but a step to place under the control of commissions, the remaining utilites of the state.

The Growth of the Movement.—We must not jump to the conclusion that all states have gone this far. On the contrary, the states that have progressed in such degree as this, are in a noticeable minority. Missouri is with the minority. Massachusetts was the pioneer state in public utility regulation. She passed a law in 1885, of limited benefit, but it was the initial step. She stopped with that step, however, and not even the hard two year's fight made in that state by the progressives under Governor Foss has been able to move her to further action.

In 1905, New York established a commission to regulate gas and electric rates. And the same year, LaFollette's fight of several years in Wisconsin, resulted in the establishment of a railroad commission.

In 1907, both New York and Wisconsin took a long step forward and placed the full control of all public utilities in the commissions already established. In Wisconsin, the commission retained its title of the "railroad commission" and we have the anomaly of finding control of gas, water and electric companies, telegraph and telephone companies vested in a railroad commission.

In 1909, the agitation for state commis-

(1) 30 Conn. 523.
(2) 94 U. S. 113.

sions was nationally general and was generally fruitless. Bills were introduced in most state legislatures and everywhere failed of passage. In Connecticut and New Jersey, the demand was especially insistent. In New York, the best efforts of Gov. Hughes only resulted in the appointment of a committee to consider the placing of telegraph and telephone companies under control of the commission and to report in 1910.

In 1910, New Jersey and Maryland fell into line, and New York extended the control of her commission to include the telegraph and telephone companies. The New Jersey law, as might be expected, was weak. The Maryland law, on the contrary, was carefully drawn to include the best of the New York and Wisconsin laws and is probably the best law on the subject that is on the statute books of any state to-day.

In 1911, the harvest was ripe. New Hampshire, Kansas, Ohio, Oregon and Washington all established commissions. And in Illinois, Iowa and Pennsylvania, the bills were introduced and vigorously pushed, but failed of passage. In practically every other state the agitation was, at least, begun.

Analysis of the Maryland Law.—I wish that space permitted us to analyze the Maryland law. Let it suffice to say that the commissioners are appointed by the governor, as is the general counsel of the commission. Their salaries of $5,000 or $6,000 are borne in nearly equal measure by the state and the city of Baltimore. Public utility companies are required to furnish, to quote the language of the statute, "such service and facilities as shall be safe and adequate, and in all respects reasonable, and all charges shall be just and reasonable and not more than allowed by law or the orders of the commission." The commission can examine all records or properties of all utilities, must investigate all complaints, and must prescribe a uniform system of accounts. The commission alone can require, and alone can permit extensions and improvements. The commission must approve all issues of stocks and bonds, must approve all assignments of franchises or mergers of utility companies. These later, of course, are very important provisions, but not more important than the provision which forbids the valuation of a franchise at any sum greater than the amount paid for the franchise. The commission must make and keep up to date an accurate valuation of the assets of the different utilities within its jurisdiction.

Methods and Powers of Utility Commissions.—Valuation of Properties.—Let us consider for one moment the method of operation by which, under the laws described, a public utility commission may accomplish the objects of its creation.

First as to valuation of properties. For the reasons and by the methods to which I have alluded, and which are familiar to every thinking man of to-day, we find almost all public utilities heavily overcapitalized. Their stock is "watered," to use the current phrase. As expressed by Mr. Roemer, of the Milwaukee Commission, in an address before the Bar Association of Wisconsin, in 1909:

"Most public utility plants are owned and operated by public service corporations, whose corporate securities, as a rule, bear no relation either to the actual investment in, or present value of, such plants. * * * In fact, the capital stock of a public service corporation often represents little more, if anything, than the capitalization of an image of the vivid imagination of some not overscrupulous promoter."

These securities having been issued, there must be considered on the one hand, the investors in the stocks and bonds who feel that they are entitled to a fair return on the prices they have paid for these securities, and on the other hand the public, which must bear the burden of the exacted income, whether it be reasonable or excessive. The only basis on which charges can be figured, of course, is the value of the property—the size of the investment.

It will be observed that in the valuation

of the property, the law forbids that any value shall be given to the franchise other than such amount, if any, as shall actually have been paid for it. Under the further provisions of the law, the commission must inventory and appraise all of the physical property. This appraisal is taken with the greatest care and in great detail. To the sum total shown as the correct valuation, must be added certain items. Thus the valuation must be taken as on a *going* concern. If the business were to end, it is conceivable that the machinery, rolling stock, etc., would only have the value that they would bring under the hammer. But if the plant is to continue in business, then the owners must figure on receiving a fair rate of interest on the sum which represents the expenditures which they made in the development period of the business, the depreciation that could not be protected because the income was not sufficient in that period, the interest on the investment unpaid while the business was being fairly launched, the taxes, insurance, discounts on bond isues and all the initial expenses that have legitimately and necessarily gone into the business, and which must be recognized equally with the tangible, existing property. On the final aggregate valuation, the company must be permitted to earn a fair return. And this aggregate valuation must be determinative of whether or not the utility may increase its capitalization, or may make other and further bond issues.

Indeterminate Permits.—Space is lacking for more than a hasty sketch of further features of the operation of these laws establishing commissions. But we ought to speak of the provisions for indeterminate permits. In Wisconsin, for example, the law provides[3] that every franchise or license thereafter granted shall be in the form of an indeterminate permit. This amounts to a perpetual franchise so long as the conditions enjoined by the state and the rules of the commission are complied with. The law provides that utilities operating under a franchise, may surrender these for indeterminate permits. There are many details in this law, which I may not mention, but one provision is that the municipality may take over the utility at any time on paying the appraised valuation.

To the utility company there are obvious advantages in this arrangement. Thus it has freedom from competition. It has a perpetual franchise. It cannot be "sandbagged" by corrupt legislative bodies when renewals of the franchises become necessary, or when extensions must be made. The securities are placed on a plane of stability comparable to municipal bonds. On the part of the public too, there are no less desirable features. The permit may be revoked on bad behavior. The utility may be acquired by the municipality whenever such acquisition may be desired.

It is interesting to note that while the utility companies in Wisconsin generally admitted the desirability of indeterminate permits, only a few surrendered their franchises in order to obtain them, and the reason for this was because of the fear that such surrender might operate as a matter of law to lessen the security of the bonds. Therefore, last winter, the Wisconsin legislature settled the matter by exercising the power reserved in the constitution to alter or repeal corporate franchises, and amended every franchise, making it an indeterminate permit. So at present all utilities in Wisconsin are operating under this form of privilege. The description of indeterminate franchises is well set out by Wilcox,[4] when he says:

"The best kind of franchise is one that is indeterminate as to time, and one that reserves to the city the right of revocation at any time, upon condition that the city

(3) Sect. 1797 m, Ch. 499-1907.

(4) 1 Wilcox on Mun. Fran. 215.

purchase the plant and the property of the company at a reasonable valuation, not including any franchise value, but with a provision for a bonus over cost, in cases where the franchise is made before the property has been fully developed as a paying enterprise."

Uniform System of Accounting.—One other provision incorporated into all of these statutes establishing commissions that makes for efficiency, is the requirement for an *uniform system of accounting.*

Recently I was in Milwaukee and the Commissioner of Public Works invited me to inspect the incineration plant built there a year ago. I had seen a report of the plant showing a net ton cost of garbage disposition of about 75 cents. I questioned him about this and he showed me a new report which they had gotten out under the new system of accounting. This showed a cost of disposition nearly four times as great. The difference was that the first figure was not much more than a mere operating cost unit. They had omitted to charge the plant with such items as interest on the investment, depreciation of nearly 10 per cent per year, insurance, taxes, etc. How could it be possible to compare results of two plants where one figures in its overhead and the other does not? Here we readily see the necessity of an uniform system of accounting. Inasmuch as the law places the municipal plants, along with all the privately owned plants, in the charge of the commission, the public is now able to compare the results obtained by different plants and by the separate departments of different plants and to place honor and blame where honor and blame are due.

If space afforded, I would like to consider such further features as the "sliding scale" provisions of the Wisconsin law which was designed to encourage private initiative and energy. It is obvious that if the only reward of an able management which has, by new devices and careful training of employees, succeeded in operating at less cost than competitors and in accumulating a surplus,—if the only reward to such a management is to cut its rates so that *all* the benefit passes to the public, then common-sense tells us that the system tends to discourage the getting of the best results. This is sought to be met in the Wisconsin laws by a sliding-scale provision which permits the commission to sanction profit-sharing devices when reasonable, so that the utility company can share in the results of its own superior management.

I would like to speak of the "invalidity clauses" in the Taylor ordinance that ended the nine years' street car fight in Cleveland under Tom Johnson and by which it is hoped that if any of the four important stipulations won for the public in that ordinance, are declared invalid, then that the benefits may still be retained under alternative provisions. I would particularly like to describe the wonders that have been worked under the commissions, in the way of securing uniformity of service, doing away with discriminations, in establishing standards of cost in gas and electric service, in improving fire protection, in standardizing meters, in special investigations of overcharges and of inefficient systems of management, in causing new installation of new machinery, and all the other work that has caused the utility commissions already established to be so respected and admired. Space, however, for further consideration is obviously lacking in a paper of this character.

That the mere taking of public utility companies out of politics is, by the establishment of commissions, practically assured, is, in itself, sufficient reason for their establishment. In the regulation of railroad rates, as in Wisconsin where in two years

a saving to the people of that state of $1,970,000.00 in intrastate shipments was effected; in the control and guidance of the issue of utility securities, as in New York City in the reorganization of the metropolitan traction systems after Ryan and Whitney and Belmont and others had extracted their fortunes; in the saving of human life by installation of proper fenders, brakes and other appliances as in New York City, creased by thirty per cent; in all of these where, in one year, the fatalities were derespects the dawn of a humane and reasonable era has crept in that causes glimpses of Paradise on earth to obtrude upon our wondering vision.

And not the least of the advantages, is the change of the attitude of the public service companies and their employees toward the public. A gentleman complained to the Commission of the First District in New York, that is, the district of New York City proper. He complained of a condition in the street railroad service. His complaint was forwarded to the company by the commissioner and was promptly recognized as just and the trouble was remedied. He wrote to the Commission:

"The matter complained of is now being attended to, and I avail myself of this opportunity to say that after a residence of practically fifty years in New York City, I am astonished and more than gratified at the prompt, courteous and effective consideration which has been accorded my complaint by a public body. I had not thought it possible."

Speaking of this letter, Lyman Beecher Howe said:

"The corporations now encourage complaints to come to them direct. When it cost nothing to be polite, they were rude, when it costs something to be rude, they are generally polite."

L. L. LEONARD.

St. Louis, Mo.

ROTHSCHILD et al. v. TITLE GUARANTEE & TRUST CO.

Court of Appeals of New York, Feb. 20, 1912.

97 N. E. 879.

A mortgage securing a bond was executed in intestate's name on November 6, 1899, but it was in fact forged by her son, which intestate learned about a year after its execution, and with such knowledge in November, 1900, she paid to the mortgagee the six months' interest due in October, 1900, and also paid the interest then due on May 1, 1901, and the rest of the interest was paid up to October, 1904, at which time the mortgagee first learned of the forgery and refused, upon intestate's demand to surrender the mortgage. Held, that while intestate was not estopped, by her silence up to the time she paid interest, from asserting the invalidity of the mortgage, she was estopped from afterwards asserting its invalidity by voluntarily paying interest thereon.

COLLIN, J.: The plaintiffs, as the executrices and devisees under the probated will of Caroline Strauss, demand a judgment compelling the defendant to cancel and discharge of record a mortgage, in form, held by it upon premises owned by the testatrix at the time of her death and devised to them. The mortgage, dated and recorded November 6, 1899, purported, on its face, to have been executed by Caroline Strauss and Baldwin F. Strauss, her husband, to the defendant to secure their bond of even date for $2,000, to mature November 6, 1902, with interest from its date to be paid April 1, 1900, and thereafter semiannually. Caroline Strauss did not execute, and was wholly ignorant of the negotiations for and the giving of, the instruments. Her name thereon was forged. Baldwin F. Strauss, the son of Caroline, negotiated the loan, effected the execution of the bond and mortgage, and received the $2,000 paid by the defendant in two checks to the order of Caroline Strauss and Baldwin F. Strauss. He was an attorney in Brooklyn, receiving an income of several thousands of dollars a year and of good reputation until his disappearance in March, 1903. About one year after the making of the loan, Caroline acquired full knowledge that it had been made upon the security of the said instruments and that her signature had been forged thereon by the procurement of Baldwin, and, having such knowledge, on or about November 27, 1900, caused to be paid to the defendant out of her own moneys the six months' interest due October 1, 1900, and on or about May 1, 1901, caused to be paid to the defendant out of her own moneys the interest

which then became due. Each other interest payment up to and including that which became due October 1, 1904, was made at or soon after its maturity, but it does not appear in the defendant's books of account, duly kept in the ordinary course of its business, who made any of the payments, including those caused to be made by Caroline. Caroline died December 21, 1903. Soon after October 28, 1904, the defendant acquired its first knowledge or notice of the forgeries, and refused upon the demand of the plaintiffs to surrender the mortgage. Since Baldwin F. Strauss' disappearance, defendant has made diligent search and inquiry for him and has learned that he left the state, but has been unable to discover his whereabouts or whether he is still alive. The trial court rendered its judgment, which the Appellate Division affirmed, that the mortgage was a cloud upon the plaintiff's title and should be discharged and surrendered by the defendant. The appellant contends that the facts as found did not authorize the judgment.

(1) A principle of law is: Where a person wronged is silent under a duty to speak, or by an act or declaration recognizes the wrong as an existing and valid transaction, and in some degree, at least, gives it effect so as to benefit himself or so as to affect the rights or relations created by it between the wrongdoer and a third person, he acquiesces in and assents to it and is equitably estopped from impeaching it. This principle is applicable to the facts found and requires the reversal of the judgment.

(2) When Caroline Strauss acquired, about one year after the transaction between the defendant and her son, full knowledge of the facts constituting the transaction, the right of action to compel the defendant to discharge the mortgage was vested in her. It was a cloud upon her title to the lands it described, impeachable only by extrinsic evidence proving that it was not her act or deed and was executed without her knowledge or authority. Nor did the protection of her property lie solely in that right of action. She might have defended against an attempted enforcement of it by foreclosure, upon the facts constituting her right of action for its cancellation. Viele v. Judson, 82 N. Y. 32. She did not lose this right of action or protection by her silence. The law does not withdraw its remedies from a person against whom a wrong is committed merely because he in silence and without proclamation or complaint recognizes and endures the wrong. Mere silence or passivity on the part of Caroline would not have precluded her from the remedies protective against the effects of the forged instruments. Her silence instigated no action and caused no wrong.

(3) A fraudulent purpose or a fraudulent result lies at the basis of the doctrine of equitable estoppel through silence or inaction. Actual or intended fraud is not an element essential to it. Neither affirmative acts or words nor silence maintained with the fraudulent intention of deceiving are indispensable elements of it. But it arises only when, relatively to the party invoking it or his privies, the omission to speak is an actual or constructive fraud. Its existence requires that the party against whom it acts remained silent when he had the opportunity of speaking and when he knew or ought to have known that his silence would be relied upon, and that action would be taken or omitted which his statement of the truth would prevent, and that injury of some nature or in some degree would result. Thompson v. Simpson, 128 N. Y. 270, 28 N. E. 627; Collier v. Miller, 137 N. Y. 332, 33 N. E. 374. Caroline had not information or notice that the mortgage was to be given, did not participate in the transaction, and committed or omitted no act moving the defendant to enter into it. She could not speak in regard to it. Under the principles we have enunciated, her silence after she first heard of it did not equitably estop her from impeaching it.

The payments of interest by Caroline worked a different result. The transaction of which the forged mortgage was a part created rights and relations between the defendant and Baldwin F. Strauss. The defendant from the moment the checks it gave Baldwin were paid, might, had it been conscious of the truth, have availed itself of civil remedies for the recovery from him of the $2,000; it might also, by its complaint and information, have subjected him to prosecution criminally. The right of seeking restoration and payment from the person who accomplished or procured the forgeries was in itself a substantial and valuable one. Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Continental National Bank v. National Bank of the Commonwealth, 50 N. Y. 575. Caroline could not by act or declaration diminish or thwart that right and not incur responsibility. The defendant was entitled to have it and the relations between itself and Baldwin F. Strauss remain unaffected by any act or interference on her part. It believed that the apparent lien upon her property created by the mortgage apparently sign-

ed and acknowledged by her secured the payment of the $2,000 it had advanced under that belief. She knew such fact and the further fact that her signature was a forgery. The right to foreclose the lien securing the interest, upon a default in its payment, is usual and ordinary, and it may be presumed, such fact was likewise known to her. We are not required to consider what results an action for the foreclosure of the mortgage, because of a default in the payment of interest due October 1, 1900, would have produced. A reasonable, if not necessary, inference would seem to be that a disclosure of the forgery or a completed foreclosure would be consequent. It is sufficient, however, for the purposes of our review, that, if the interest had not been paid, the right to foreclose would have arisen, and that she having full knowledge of the facts paid the interest and thus prevented the upspringing of the right and the exercise of it by the defendant. Continental Nat. Bank v. National Bank of the Commonwealth, 50 N. Y. 575; Voorhis v. Olmstead, 66 N. Y. 113. She by making the payments recognized the mortgage and the lien it seemed to create as real and existing, extended their existence, and retarded or intercepted the natural growth and development of the rights and relations between the defendant and her son, and benefited her son and, presumptively, within her contemplation, herself. She could not be permitted to thereafter repudiate the mortgage. The payments of the interest made by her and their effects, and a subsequent repudiation of the mortgage by her, would be inconsistent with each other, would not be responsive to the demands of justice and good conscience, and would effect a fraudulent result. When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable. Vohmann v. Michel, 185 N. Y. 420, 78 N. E. 156, 113 Am. St. Rep. 921; 2 Pomeroy's Equity Jurisprudence (3d Ed.) §§ 816-821, 965.

(4) It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation. The courts apply it, in accordance with established general principles, in order that the transactions and dealings may result justly and fairly with the parties concerned with them; and it operates against an unjust repudiation of a sealed or a forged instrument. It does not require the positive distinct action or language needed and intended to renew and ratify a transaction and make it valid and binding; it prohibits a person, upon principles of honesty and fair and open dealing, from asserting rights, the enforcement of which would, through his omissions or commissions, work fraud and injustice. It would have prohibited Caroline from maintaining in her lifetime this action, and manifestly the right of the plaintiffs is only that held by her.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and HISCOCK, JJ., concur. WERNER, J., dissents.

Judgment reversed, etc.

NOTE.—*Estoppel in Pais From Paying Interest on Forged Note, Where Mere Lapse of Time Intervenes.*—The principal case appears to be a very drastic application of the rule of estoppel—especially where the case admits that mere silence after knowledge would not have had that effect. But the ruling does not call the payment assumption of the obligation, as some cases might. We have thought it would be interesting to notice some cases where slight disadvantage—not actual, but probable or possible—sustained a ruling of estoppel *in pais*, but we think the principal case goes further than any of them.

This case reversed an unanimous opinion by four judges of the Supreme Court in Appellate Division, S. C. 139 App. Div. 672, 124 N. Y. Supp. 441. This opinion is brief and the following extract is made therefrom: "It seems unnecessary to analyze the many cases presented by the learned counsel for appellant, inasmuch as none of them holds that the mere payment of the interest money, with a knowledge of the forgery and without disclosing that fact, estops the plaintiff, in the absence of any proof that the holders of the instrument were thereby prevented from enforcing any remedy in their power, and in the absence of any proof that their position in the premises was thereby changed to their disadvantage. The court has found as a fact that Mrs. Strauss made two payments of interest with knowledge of the forgery. She died shortly after the second payment. The court has also found, presumably on sufficient evidence, that such payments were made without fraudulent or wrongful intent, and has refused to find that they were made with any design of shielding her son from the consequences of his wrongful act or that the payments in any way prevented the holder of the mortgage from discovering the forgery, or from taking any lawful steps which might have resulted in the recovery from the wrongdoer of the amount of the loan secured by the mortgage or any part of it.

In the circumstances it cannot be said as a matter of law that there was such a duty upon the deceased to disclose the infirmity of the security, when she discovered it, as to create an

equitable estoppel on her failure to do so. It cannot be said that the mere payment of interest ratified the unauthorized and unlawful act of her son in forging her name."

It will be observed that the principal case does say mere silence by the mother "did not equitably estop her." Also it says as the only result that payment of interest brought about was to interfere with civil remedies or a criminal prosecution, but it is not stated that this interest paying barred recourse to either, or that resort earlier to a civil remedy would have put the holder of the note in a more favorable position—or rather that postponement prejudiced him.

The case of Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 29 L. Ed. 811, which the principal case cites to the proposition that the right of seeking restoration and payment, which, however, was not stated to have been lost, from the wrongdoer is a valuable one, is on a familiar line, and decides merely on a depositor's duty to examine his pass-book and vouchers and if neglect to do this misleads a bank to its prejudice, there is an estoppel. In that kind of a case the depositor was said to be attempting "to falsify a stated account, to the injury of the bank, whose defence is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it." In this case the clerk who had committed the forgeries had absconded in March, 1881, and alterations and forgeries had continued from September, 1880, down to the time of his absconding.

In the other case cited, Continental National Bank v. Nat. Bank of the Commonwealth, 50 N. Y. 275, the very ground of recovery was, that by the act of the defendant, opportunity was lost both of stopping payment of the checks that were forged and obtaining from a fugitive gold in his possession, the fraud being made successful within the course of fifteen minutes, the fugitive having laid all his plans to escape during that brief interval with the money on his person.

The opinion says: "In Casco Bank v. Keene, 53 Me. 103, arrest is named as one of the means of obtaining security which the plaintiff had let slip. * * * We need not go so far here. Arrest and detention of the swindler is a powerful means in coercing restoration; and arrest and detention were as probably in the power of Cronise & Co. as the stoppage of the payment of the checks at the Bank of New York." This case therefore shows a practical effort in two directions was lost—not merely postponed.

In Voorhis v. Olmstead, 66 N. Y. 113 it was said in a case where money was advanced on a pledge of property by one who had no right to pledge it, and defendant, a warehouseman, gave lender a warehouse receipt and thus induced him to believe the property was rightly pledged and thereby he was misled not to redemand his money and the pledgor failed the next business day it was said: "It was not necessary in the present instance for the pledgee to show that a demand of the money loaned would have certainly resulted in its recovery. It is enough that its position was altered by relying on the evidence of title furnished and abstaining from action."

It cannot be contended that the payment of interest as shown by the principal case was ratification of a forgery, because the doing of a criminal act could not be ratified. Henry v. Heeb, 114 Ind. 275, 5 Am. St. Rep. 613. But what was done was binding only on the payer upon the principle of an estoppel *en pais*. Therefore the whole question is whether the situation amounted to the creation of such an estoppel. But it is to be said there are cases where there may be recovery as where one may be bound by merely adopting a forged signature or assuming an obligation he did not sign. Wellington v. Jackson, 121 Mass. 157; Hefner v. Vandoloh, 62 Ill. 483, 14 Am. Rep. 306. But the principal case treats the matter as one of estoppel by conduct.

A Kentucky case quotes from Pomeroy's Eq. Jur. 804, with approval, the following as to what constitues an equitable estoppel: "Sec. 804. Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed, either of property, of contract or of remedy, as against another person, who has in good faith relied upon such conduct, and who has been led thereby to change his condition for the worse." Louisville Bkg. Co. v. Asher, 23 Ky. L. R. 1661, 65 S. W. 831.

In that case the facts show the assertion of a remedy was merely delayed but that there was no change in the situation and relief was denied.

In all of the cases we have cited and where the courts spoke in the broad way, the principal case does, at least, some more favorable opportunity to collect from the wrongdoer or compel restoration at first existed than remained. In the principal case nothing of this kind appears or was even suggested by the facts. Mere delay, however, without even an assumption or assertion of change appeared. It looks like there were not the necessary elements of an estoppel *in pais* and that the reversed opinion was correct.

C.

HUMOR OF THE LAW.

Diogenes hurried down the street, dragging a man by the coat collar. "Are you sure that's him?" someone asked. The old fellow's smile was simply cherubic. "It must be," he said. "He is a lawyer, but he admits that he can't make head or tail of the Standard Oil decision."—St. Louis Post-Dispatch.

They were on the subway. The middle-aged man was sober, but his young companion had confided to him in particular, and to the whole car in general, that the champagne had tasted unusually fine that evening.

"I see by the paper," commented the sober one, "that a lot of millionaires are going to be presented at court in London."

"Yesh," agreed the youth; "shum of 'em go to court, and shum go to jail."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Action**—Practice.—Persons damaged in person or in character cannot maintain a joint action; for the right to recover is of necessity a personal and individual right.—Anderson v. Evansville Brewing Ass'n., Ind., 97 N. E. 445.

2. **Bailment**—Subject of.—Any kind of personal property, including current money and even a chose in action, if in existence, may be the subject of a bailment.—Van Wagoner v. Buckley, 133 N. Y. Supp. 599.

3. **Banks and Banking**—Collection.—In an action by a depositor to recover the amount of a check deposited by him, but charged back by the bank, the burden held on him to show that the bank collected the amount of the check, or that collection was prevented by its neglect.—Stein v. Empire Trust Co., 133 N. Y. Supp. 517.

4.——Implied Promise.—The issuance of a check on a bank implies a promise that the bank will pay the amount thereof, and, if it does not, that the drawer will pay the same to the holder.—Bank of Venice v. Clapp, Cal., 121 Pac. 298.

5. **Bills and Notes**—Practice.—Where, in an action on a note, defendant admits execution and assumes burden of affirmative defense, held error to charge that plaintiff was to make out his case by preponderance of evidence.—Cox v. McKinley, Ga., 73 S. E. 751.

6.——Release of Indorser.—Extension of the time of payment is no defense to an action against an indorser of a note, unless supported by a consideration.—Hodgens v. Jennings, 133 N. Y. Supp. 584.

7. **Breach of Marriage Promise**—Married Man.—A woman may maintain an action for breach of marriage promise against a man married at the time of the engagement if she was ignorant at the time of the engagement.—Waddell v. Wallace, Okla., 121 Pac. 245.

8. **Cancellation of Instruments**—Bona Fide Purchaser.—Fraud in the procurement of a deed is unavailing, in a suit to set it aside, against a bona fide purchaser.—Hill v. Horse Creek Coal Land Co., W. Va., 73 S. E. 718.

9. **Carriers**—Joint Liability.—Carriers forming an association to carry on the business of carriage for hire held jointly and severally liable to a shipper for a negligent breach of a carrier's duty.—R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co., Mo., 143 S. W. 839.

10.——Notice of Purpose.—Carrier contracting to deliver certain machinery at a certain time for a certain purpose, and failing so to do, held liable for such amount, as would reasonably compensate the shipper.—Ft. Smith & W. R. Co. v. Williams, Okla., 121 Pac. 275.

11. **Carriers of Goods**—Inherent Defects.—A carrier held not liable for such damages as result solely from an inherent infirmity in the goods in its care.—R. E. Funsten Dried Fruit & Nut Co. v. Toledo, St. L. & W. R. Co., Mo., 143 S. W. 839.

12. **Carriers of Live Stock**—Feeding and Watering.—Under Act Cong. June 29, 1906, a carrier may not contract to relieve itself from the duty to feed and water animals in transit.—Southern Ry. Co. v. Proctor, Ala., 57 So. 513.

13. **Carriers of Passengers**—Licensee.—One going on a train to assist a woman and young children who intend to become passengers is a licensee.—Southern Ry. Co. v. Parham, Ga., 73 S. E. 763.

14. **Chattel Mortgages**—Animals.—The progeny of mortgaged animals, born after the making of the mortgage, are subject to its lien.—Swint v. State, Ala., 57 So. 394.

15.——Description.—A descript'on in a mortgage, "one mouse-colored mare mule, five years old," was sufficient as a matter of law.—First Nat. Bank of Fitzgerald v. Spicer, Ga., 73 S. E. 753.

16.——Foreclosure.—A mortgagee who seizes the mortgaged live stock for sale under the power in the mortgage held entitled to reasonable expenses incurred by him in the care and maintenance of the stock prior to sale.—Zadek v. Burnett, Ala., 57 So. 447.

17.——Secret Bill of Sale.—A secret bill of sale, intended as a chattel mortgage, is unenforceable as against a subsequent recorded mortgage to a third person without notice of the other lien.—Vander Weyden v. Coors, Colo., 121 Pac. 155.

18. **Constitutional Law**—Presumptions.—Creation by law of presumptions held not a denial of due process of law, where opposite party is not deprived of right to rebut them.—Goldstein v. Maloney, Fla., 57 So. 342.

19. **Contracts**—Architects.—An architect employed to draw plans and specifications and to superintend the work has no implied power to bind the owner by agreeing to a modification of the contract.—Brown v. Coffee, Cal., 121 Pac. 309.

20.——Condition Precedent.—Where a contract made written acceptance by the architect a condition precedent to payment, a recovery can be supported only by proof of acceptance.—

A. D. Granger Co. v. Brown-Ketcham Iron Works, N. Y., 97 N. E. 523.

21.——Consideration.—A promise by a vendee to pay the vendor rent, where the vendor executed bond for title providing only for stipulated payments, held invalid for want of consideration.—Able v. Gunter, Ala., 57 So. 464.

22.——Parol Evidence.—The rule that written contracts cannot be varied by parol does not prevent the showing of a total or partial failure of consideration by parol evidence.—Patt v. Leavel, Mo., 143 S. W. 835.

23.——Restraint of Trade.—Agreement not to engage in manufacture and sale of regalia within five years under penalty of $5,000 liquidated damages without limitation as to territory held void as in general restraint of trade.—Floding v. Floding, Ga., 73 S. E. 729.

24. **Corporations**—Internal Management.—A stock corporation organized in West Virginia is controlled in its internal management by the statutes of that state.—San Remo Copper Mining Co. v. Moneuse, 133 N. Y. Supp. 509.

25.——Rights of Stockholders.—Where the directors or majority stockholders seek to fraudulently circumvent the minority stockholders, an action by the corporation or by the stockholders lies.—Continental Securities Co. v. Belmont, 133 N. Y. Supp. 560.

26.——Seal.—Written transfer of a note by a corporation as the payee named therein passes title to the transferee, though the corporate seal is not affixed.—Christie v. Shingler, Ga., 73 S. E. 751.

27.——Stock Subscription.—In case of an original stock subscription, it is immaterial when a subscriber signs a subscription paper, or whether his name appears on the bottom of the paper or elsewhere.—Palais Du Costume Co. v. Beach, Mo., 143 S. W. 852.

28. **Courts**—Practice.—The appointment as court interpreter of a person who had contributed toward a fund for accused's prosecution avoids a conviction.—State v. Labarone, La., 57 So. 532.

29. **Criminal Evidence**—Suspicion of Guilt.—One cannot be convicted of an offense upon evidence which merely raises a suspicion of guilt.—City of Hazlehurst v. Byrd, Miss., 57 So. 360.

30. **Criminal Law**—Former Jeopardy.—Accused held estopped to plead as a former jeopardy the beginning of a former proceeding against him on the same charge which he procured to be dismissed.—Stinson v. State, Ala., 57 So. 509.

31.——Practice.—A failure of a defendant, in a prosecution for assault with intent to murder, to remember what he had testified to in a preliminary examination, held proper to be referred to in argument.—Stanfield v. State, Ala., 57 So. 402.

32. **Damages**—Measure of.—Where an offender is liable, both criminally and civilly, for damages, exemeplary damages cannot be assessed against him in the civil suit.—Anderson v. Evansville Brewing Ass'n., Ind., 97 N. E. 445.

33. **Dedication**—Estoppel.—A mortgagee purchasing under judgment the mortgaged premises platted into lots, blocks, streets and alleys held bound by a dedication for streets and alleys.—City of Louisville v. Mutual Life Ins. Co. of Kentucky, Ky., 143 S. W. 782.

34.——Preponderance of Evidence.—Where an heir sues to set aside a deed on the ground of the inasnity of his ancestor, and the evidence is equally balanced, the court will refuse to set aside the deed.—Farr v. Chambless, Ala., 57 So. 458.

35. **Disorderly House**—Husband and Wife.—The presumption that a bawdy house occupied by a husband and wife is under his control is rebuttable.—State v. Hoelcher, Mo., 143 S. W. 850.

36. **Divorce**—Custody of Children.—At the conclusion of divorce proceedings, the court has jurisdiction whatever the decision may be to provide for the care of the children.—Ex parte Cooper, Kan., 121 Pac. 334.

37. **Escrows**—Requisite Delivery.—Delivery of the instrument to a third person is essential to a valid escrow; and hence a mortgage cannot be held in escrow by the mortgagee.—J. M. Robinson, Norton & Co. v. Randall, Ky., 143 S. W. 769.

38. **Estoppel**—Corporation.—Holder of note executed in name of pretended corporation by one who assumed to act as president held not estopped from maintaining action against incorporators by having procured adjudication by referee in bankruptcy that the note is that of the corporation.—Central Nat. Bank of Junction City v. Sheldon, Kan., 121 Pac. 340.

39. **Evidence**—Admissions.—Where a superseded pleading is put in evidence as an admission, the party against whom it is used may explain under oath the admissions therein.—Toone v. J. P. O'Neill Const. Co., Utah, 121 Pac. 10.

40.——Admissibility.—It is not permissible to prove a parol agreement that indorsers shall be liable on promissory note as guarantors only.—Hodgens v. Jennings, 133 N. Y. Supp. 584.

41.——Admissibility.—That plaintiff destroyed invoices and other papers held not to render testimony as to loss of profits inadmissible, where such destruction was compatible with good faith.—Di Palma v. Weinman, N. Mex., 121 Pac. 38.

42. **Execution**—Cumbersome Property.—The levying officer need not move cumbersome property levied on.—Grace v. Finleyson, Ga., 73 S. E. 689.

43.——Estoppel.—Where defendant secured possession of property levied on by giving bond, he was estopped from attacking it as invalid.—Alexander & Sons v. W. E. Morris & Co., Ga., 73 S. E. 700.

44.——Levy.—It is the duty of an officer to levy upon property sufficient to satisfy the execution, allowing for probable depreciation.—Levens v. State, Ala., 57 So. 497.

45. **Executors and Administrators**—Burden of Proof.—Return of executor, administrator, or guardian, allowed by court of ordinary, may be impeached by other evidence; the burden of proof being upon the party seeking to impeach it.—Peavy v. Clemons, Ga., 73 S. E. 756.

46.——Estoppel.—Where one conveys property to defraud creditors, his administrator cannot sue transferee to recover possession to pay creditors of decedent.—Perry v. Reynolds, Ga., 73 S. E. 656.

47.——Gratuitous Services.—Where a nephew assumed the care of his uncle, held, there was nothing in the relationship from which the law presumes the services to have been gratuitous.—Tucker v. Tucker, Colo., 121 Pac. 125.

48.——Right of Discharge.—The right of an administrator to be discharged after final settlement and performance of his duties is necessarily implied, though not expressly authorized by statute.—In re Rooney's Estate, Mo., 143 S. W. 888.

49. **Fraudulent Conveyances**—Creditors.—A creditor is entitled to relief from a fraudulent sale by his debtor, though the consideration represents full value.—Wills v. Mooney-Mueller Drug Co., Ind., 97 N. E. 449.

50.——Wages in Advance.—An employer's payment of wages in advance held not subject to attack as fraudulent by creditors of the employee.—Pike County v. Sowards, Ky., 143 S. W. 745.

51. **Frauds, Statute of**—Stockholder's Promise.—The rule that a direct promise to pay for goods to be delivered to another on the credit of the promisor is not within the statute of frauds, held applicable to a promise by a stockholder.—Goldie-Klenert Distributing Co. v. Bothwell, Wash., 121 Pac. 60.

52. **Habeas Corpus**—Authenticating Evidence.—Habeas corpus for the discharge of accused, bound over for trial, must be denied, where the evidence on his preliminary examination is not authenticated.—Ex parte Ross, Cal., 121 Pac. 306.

53. **Highways**—Dedication.—A public highway must have been established either by regular proceeding or general use by the public for 20 years or dedicated by owner of the soil.—Bellview Cemetery Co. v. McEvers, Ala., 57 So. 375.

54. **Homicide**—Intoxication.—It is no defense to a murder charge that accused was under the influence of whisky furnished by decedent.—Crawford v. State, Ala., 57 So. 393.

55. **Homestead**—Conveyance.—While a husband and wife need not execute a conveyance of their homestead at the same time, the conveyance is not complete until executed by both, and until then there can be no valid delivery.—Eldridge v. Hunter, Tenn., 143 S. W. 892.

56. **Husband and Wife**—Maintenance.—That a wife had refused to join in executing conveyances as she had agreed to do in a separation agreement should be pleaded as a defense to an action by her for maintenance.—Jones v. Jones, Ala., 57 So. 376.

57. **Indictment and Information**—Secondary Evidence.—The fact that an indictment is based upon secondary evidence does not necessarily vitiate it.—Torres v. Territory, N. Mex., 121 Pac. 27.

58.——Sufficiency.—An indictment for felony, though in the language of the statute, is not sufficient, unless it states all the elements necessary to constitute the offense.—Petitti v. State, Okla., 121 Pac. 278.

59. **Infants**—Next Friend.—On special demurrer that suit is brought in name of person as next friend of the minor, instead of by the minor himself through his next friend, the better practice held to be to sustain demurrer and allow amendment.—Linder v. Brown, Ga., 73 S. E. 734.

60. **Injunction**—Remedy.—Defendant, failing to appeal from the judgment before a justice, held not entitled to enjoin the issuance of execution, on the ground that the judgment was voidable; he having an adequate remedy by way of appeal.—Ellis v. Akers, Okla., 121 Pac. 258.

61.——Right of.—An injunction will not issue to protect a right not in esse and which may never arise.—Quirk v. Miller, La., 57 So. 521.

62.——Unlawful Business.—A firm engaged in selling messenger service cannot restrain a city from interfering therewith, in so far as it included the calls for messengers from houses of prostitution; the business itself being made unlawful by Rev. Codes, § 8397.—Andrieux v. City of Butte, Mont., 121 Pac. 291.

63. **Insurance**—Burden of Proof.—To recover upon an insurance policy, plaintiff must bring himself within its express provisions.—First Nat. Bank v. Maryland Casualty Co., Cal., 121 Pac. 321.

64.——Burglary.—A burglary insurance policy held not to impose liability for money taken from a safe by the use of the combination thereof, furnished the burglar by an employee.—First Nat. Bank v. Maryland Casualty Co., Cal., 121 Pac. 321.

65.——Indemnity.—A contract to indemnify an employer against liability for personal injuries is a contract of insurance.—Standard Life & Accident Ins. Co. v. Bambrick Bros. Const. Co., Mo., 143 S. W. 845.

66.——Payment of Premiums.—Where, under a policy, premiums are payable at the home office, the company may, on notice, discontinue the custom of sending an agent to collect the premiums.—Wallace v. Metropolitan Life Ins. Co., Ga., 73 S. E. 698.

67. **Judgment**—Publication Service.—A judgment rendered on service of process by publication is void where the affidavit of service is insufficient.—Empire Ranch & Cattle Co. v. Webster, Colo., 121 Pac. 171.

68. **Justices of the Peace**—Jurisdiction.—The fact that the jury, in replevin before a justice of the peace, found the value of the property greater than that stated in the affidavit, does not affect the jurisdiction of the court on appeal.—Johnson v. Tabor, Miss., 57 So. 365.

69. **Landlord and Tenant**—Alteration by Tenant.—A tenant making alterations in the building held required to restore the building at termination of the lease.—Sale v. Smith & Nixon Co., Ky., 143 S. W. 737.

70.——Attornment.—Tenants retaining possession and attorning to another landlord held liable for reasonable rent, but not as tenants.—Sheppard's Home v. Wood, Tex., 143 S. W. 988.

71.——Res Ipsa Loquitur.—In an action for injuries to an employee of a firm which was engaged in moving the effects of a tenant into one of the lofts of a building, by the fall of a freight elevator due to improper loading, the doctrine of res ipsa loquitur held not applicable.—Schactele v. Bristor, 133 N. Y. Supp. 506.

72.——Subordinate Possession.—Under the general rule, possession of tenant held to be in subordination to title of landowner, unless something has occurred to convert the holding from a friendly to a hostile possession.—Purcell v. Barnett, Okla., 121 Pac. 231.

73.——Subletting.—Stipulations in a lease against assignment or subletting are to be strictly construed.—Burns v. Dufresne, Wash., 121 Pac. 46.

74. **Libel and Slander**—Burden of Proof.—In an action for damages for slander, the plaintiff must prove the words strictly as alleged in the petition.—Vordenbaumen Lumber Co. v. Parkerson, La., 57 So. 524.

75.——Mitigation.—Defendant can show in mitigation of damages that plaintiff's general reputation was bad as to matters involved in the charge against him.—Wood v. Custer, Kan., 121 Pac. 355.

76.——Pleading.—A complaint for slander of title must not only allege that the statement complained of was false and published maliciously, but that pecuniary damage resulted to plaintiff by reason thereof.—Felt v. Germania Life Ins. Co., 133 N. Y. Supp. 519.

77. **Lis Pendens**—Amended Petition.—The lis pendens as to a purchaser of property is not affected by the filing of an amended petition which does not change the cause of action.—Bell v. Diesem, Kan., 121 Pac. 335.

78. **Marriage**—Contract Relation.—At common law marriage is a civil contract relation, valid when consummated by consent and cohabitation of parties.—Caras v. Hendrix, Fla., 57 So. 345.

79. **Mechanics' Liens**—Practice.—Foreclosure of a mechanic's lien with an allowance for attorney's fees should not be decreed where defendant had tendered more than the recovery.—Romona Oolitic Stone Co. v. Weaver, Ind., 97 N. E. 441.

80.——Waiver.—That a subcontractor relies upon the credit of the employer does not necessarily imply a waiver of the statutory mechanic's lien.—Smith v. Hopper, Wash., 121 Pac. 77.

81. **Mortgages**—Attorney Fees.—Where mortgage provides for reasonable attorney's fees, and note provides for a certain fee, the note is some evidence as to the amount to be allowed.—Merrell v. Ridgely, Fla., 57 So. 352.

82.——Duress.—A mortgage is not vitiated by force or duress, exercised by one of the mortgagors upon another, not participated in by the mortgagee.—J. M. Robinson, Norton & Co., v. Randall, Ky., 143 S. W. 769.

83. **Navigable Waters**—Common Law.—At common law all navigable waters were held by the sovereign for the benefit of the whole people.—Merrill-Stevens Co. v. Durkee, Fla., 57 So. 428.

84. **Negligence**—Attractive Nuisance.—A dilapidated and abandoned roundhouse held an attractive nuisance, rendering the railroad company liable for the death of a boy while playing about it.—Osborn v. Atchison, T. & S. F. Ry. Co., Kan., 121 Pac. 364.

85.——Sudden Peril.—Party placing person in position of peril, whereby he is led to make effort to escape threatened danger, held responsible for the consequences of such effort.—Central of Georgia Ry. Co. v. McGuire, Ga., 73 S. E. 702.

86.——Chauffeur.—The negligence of the chauffeur of a sight-seeing automobile held not imputable to a passenger.—McFadden v. Metropolitan St. Ry. Co., Mo., 143 S. W. 884.

87.——Intervening Cause.—Where there intervened, between the negligence of defendant and damage sustained, the independent criminal act of a third person, plaintiff held not entitled to recover.—Bowers v. Southern Ry. Co., Ga., 73 S. E. 677.

88.——Spreading of Fire.—Liability of one kindling a fire on his own premises for the destruction of the property of another held limited to cases of negligence.—Edwards v. Massingill, Ala., 57 So. 400.

89.——Violation of Ordinance.—The violation of an ordinance is negligence per se, entitling one injured as a result thereof to recover damages.—Watts v. Montgomery Traction Co., Ala., 57 So. 471.

90. **Novation**—Burden of Proof.—The burden of establishing a novation is upon the party who asserts its existence.—Brown v. Coffee, Cal., 121 Pac. 309.

91. **Nuisance**—Action For.—Where acts constitute a public nuisance, a private person who has only suffered with the general public cannot complain thereof.—Meredith v. Triple Island Gunning Club, Va., 73 S. E. 721.

92.——Test of.—The fact that a planing mill was erected in a district already used for residences would be a material consideration in determining whether it was a nuisance.—Harris v. Randolph Lumber Co., Ala., 57 So. 453.

93. **Parent and Child**—Confidential Relation.—The rule that a deed by a child to her parent will not be sustained unless characterized by the utmost fairness will not be enforced to defeat the contract merely because of the existence of the confidential relation.—Giers v. Hudson, Ark., 143 S. W. 916.

94. **Parties**—Capacity.—The capacity to sue is the right to come into court, and differs from a cause of action, which is the right to relief in court.—Howell v. Iola Portland Cement Co., Kan., 121 Pac. 346.

95. **Partnership**—Defective Corporation.—In absence of statute, persons assuming to organize corporation, but failing to become incorporated, held liable as partners for debts incurred.—Central Nat. Bank of Junction City v. Sheldon, Kan., 121 Pac. 340.

96.——Evidence to Establish.—A partnership cannot be established by the declarations of one of the alleged partners.—Akers v. Lord, Wash., 121 Pac. 51.

97.——Pleading.—An averment in a pleading that plaintiffs were merchants, engaged in the sale of general merchandise, is insufficient to show any joint or partnership interest.—Anderderson v. Evansville Brewing Ass'n., Ind., 97 N. E. 445.

98. **Payment**—Duress.—The withholding of property from one entitled to possession until money is paid constitutes duress, entitling the payer to recover such money.—Cowley v. Fabien, N. Y., 97 N. E. 458.

99. **Principal and Agent**—Revocation.—An agency, uncoupled with an interest, is revocable without liability for damages; but upon revocation of agency, coupled with interest, principal must respond in damages.—Cloe v. Rogers, Okla., 121 Pac. 201.

100. **Principal and Surety**—Strictissimi Juris.—Obligation of a surety, such as an accommodation indorser, will not be extended beyond its strict terms.—National Park Bank of New York v. Koehler, N. Y., 97 N. E. 468.

101. **Quieting Title**—Burden of Proof.—In a suit to quiet title, plaintiff is bound to prove that he was the owner of the land in controversy at the commencement of the action.—Brady v. Gregory, Ind., 97 N. E. 452.

102. **Replevin**—Evidence of Value.—The reasonable value of the use of property during wrongful detention is determined by the ordinary market price of such use at the place of taking.—Thomas v. First Nat. Bank of Tecumseh, Okla., 121 Pac. 272.

103. **Sales**—Condition Precedent.—Whether or not delivery is a condition precedent to a sale becoming absolute is a matter of intention.—Johnson v. Tabor, Miss., 57 So. 365.

104.——Completion.—Where goods are sold at a stated price per bushel, the sale may be complete without weighing or measuring.—Ficklin v. Linder, Mo., 143 S. W. 853.

105.——C. O. D. Shipment.—Where goods are shipped to be paid for on delivery or returned, the title remains in consignor until the conditions are complied with.—E. M. Brash Cigar Co. v. Wilson, Okla., 121 Pac. 223.

106.——Right of Action.—Where A. sells goods to B., he cannot recover the price from C., though C. had contracted with B. to pay for the goods.—Dickson v. Matthews, Ga., 73 S. E. 705.

107. **Submission of Controversy**—Agreed Statement.—The court on a submission of controversy on an agreed statement of facts held required to confine its decision to the facts stated.—Muller v. Kling, 133 N. Y. Supp. 614.

108. **Tenancy in Common**—Evidence.—Uncorroborated testimony of surviving co-owner of real estate that, as between her and the deceased co-owner, she was not to be liable for any part of the debt secured by mortgage on the property, held insufficient to release her from liability.—Succession of Alexander, La., 57 So. 534.

109. **Time**—Computation.—Where the testator made his will on the 6th day of February, and died on the 6th day of April, the will was not made "at least two months before the death of testator," under Decedent Estate Law, § 19, and a bequest to a benevolent corporation contained therein is invalid.—In re Babcock's Will, 133 N. Y. Supp. 655.

110. **Trover and Conversion**—Demand and Refusal.—Demand and refusal are necessary only as evidence of conversion, and need not be proved where conversion is otherwise shown.—Hicks v. Moyer, Ga., 73 S. E. 754.

111.——Variance.—There is no variance between a complaint in trover alleging the conversion to have been about October 18th, and the proof that it was on the 21st.—Blair v. Riddle, Ala., 57 So. 382.

112. **Trusts**—Resulting Trust.—Resulting trust held to arise where, regardless of any intent of beneficiary, the law presumes a trust.—McCoy v. McCoy, Okla., 121 Pac. 176.

113.——Termination.—The death of the life beneficiary under a testamentary trust does not of itself sever the trustee's relation to the fund, but that continues until a judicial determination of the amount held and the parties entitled thereto.—Deering v. Pierce, 133 N. Y. Supp. 582.

114. **Vendor and Purchaser**—Rescission.—Only the holder of the superior legal title, reserved in a deed to secure vendor's lien notes for the purchase price, can rescind for default in payment.—Ross v. Bailey, Tex., 143 S. W. 961.

115. **Wills**—Mental Incapacity.—One contesting the probate of a will on the ground of mental incapacity need only prove to the reasonable satisfaction of the jury that the testator was incapable.—Johnston v. Johnston, Ala., 57 So. 450.

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CONTENTS.